71-1330

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. _____

HARRY M. KATZ,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. _____

HARRY M. KATZ,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, HARRY M. KATZ, prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered in these proceedings on February 23, 1972.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, which is not yet reported, appears in the Appendix appended hereto at pages A1-A5.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on February 23, 1972. A timely Petition for Rehearing was denied on March 17, 1972, and this Petition for Certiorari was filed within 30 days of that date. The judgment of the United States Court of Appeals for the Fifth Circuit appears in the Appendix appended hereto at pages A5-A6. The Order Denying Petition for Rehearing appears in said Appendix at page A6. This Court's jurisdiction is invoked under 28 U.S.C.A. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

I

WHETHER, IN VIEW OF THE COMPLETE LACK OF NOTICE TO PETITIONER THAT HIS CONDUCT COULD BE CONSIDERED UNLAWFUL AND IN VIEW OF THE COMPLETE LACK OF EVIDENCE THAT PETITIONER KNOWINGLY ACTED ILLEGALLY, THE CONVICTION OF PETITIONER FOR CONDUCT STRICTLY IN ACCORD WITH ACCEPTED MEDICAL PRACTICE IS A VIOLATION OF DUE PROCESS OF LAW.

II

WHETHER THE FIFTH CIRCUIT'S APPLICATION OF THE SUBSTANTIAL EVIDENCE TEST WITHOUT REGARD TO THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEAL AND WITH DECISIONS OF THIS COURT.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Constitution of the United States, Amendment 5: "No person shall be . . . deprived of life, liberty, or property, without due process of law. . ."

18 U.S.C.A. §1001:

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years or both."

42 U.S.C.A. §408(c):

"Whoever . . . at any time makes or causes to be made any false statement or representation of a material fact for use in determining rights to payment under this chapter; . . . shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned for not more than one year, or both."

STATEMENT OF THE CASE

This Petition for Writ of Certiorari seeks review of the decision of the United States Court of Appeals for the Fifth Circuit affirming the conviction of Petitioner HARRY M. KATZ for violation of 18 U.S.C.A. §1001 and 42 U.S.C.A. §408(c).

Petitioner HARRY M. KATZ is a medical doctor who was convicted and sentenced to two years imprisonment on the basis of a jury verdict finding him guilty on five counts of an indictment, two of which charged him with the felony of knowingly filing false statements in violation of 18 U.S.C.A. §1001 and three counts of which charged him with the misdemeanor of filing false statements in violation of 42 U.S.C.A. §408(c). The original indictment contained 12 counts against Petitioner. Prior to commencement of the trial before the United States District Court, the United States Attorney moved to dismiss three of the counts against Petitioner and at the close of the Government's case the District Court granted Petitioner's Motion for Judgment of Acquittal as to two additional counts. Thus seven counts of the indictment against Petitioner were submitted to the jury. Count I of the indictment charged a conspiracy against Petitioner and other members of the staff of Pinellas General Hospital in Largo, Florida, for the purpose of falsifying and misrepresenting claims to the Social Security Administration for services allegedly rendered to Medicare patients. The jury acquitted Petitioner of this conspiracy charge.

The remaining six counts against Petitioner all charge that Dr. Katz filed claims with the Social Security Administration for "hospital visits" which were not made. The jury found Dr. Katz innocent on one of the six counts and guilty on the five remaining counts. The conviction

of Dr. Katz thus relates solely to the question of whether or not he knowingly made false statements in connection with the hospital visits for which he claimed payment. Although the original indictment charged that he made false statements and participated in a conspiracy which defrauded the Government in an amount in excess of $200,000, the counts on which the jury convicted Dr. Katz represent a total of only approximately $880.

During his opening statement to the jury, counsel for the Government conceded that "Dr. Katz did make rounds" but argued that Dr. Katz did not make "meaningful hospital visits . . . beyond a 'Hi. How are you.'" At that point, counsel for Dr. Katz objected that the indictment did not charge any failure to make "meaningful visits" but only charged a failure to make "visits."

During the trial, the Government produced several witnesses to testify with respect to whether or not Dr. Katz made meaningful visits to the five patients named in the five counts of which Dr. Katz was convicted. These witnesses included some of the patients themselves and relatives or friends of the patients who visited the patients in the hospital. Generally, the patients testified that they did not remember seeing Dr. Katz on each and every day for which a visit was charged. The friends and relatives, for the most part, testified that during their visits to the patients they did not see Dr. Katz. Both the patients and the relatives and visitors testified that Dr. Katz often simply came by and said "Hello" and "How are you" and did not actually examine the patients.

The Government also produced as witnesses five members of the staff at the hospital. One of these witnesses, a nurse, testified that, in making his rounds, Dr. Katz would speak to each patient and ask them how they were and if they needed anything. Two other nurses testified

that Dr. Katz visited each patient every day on which they worked at the hospital. Another one of these witnesses testified that Dr. Katz made his rounds of every patient at least two out of three nights each week when she was on duty. The fifth witness, a doctor, testified merely that during the hours he was at the hospital he did not see Dr. Katz make rounds.

At the close of the Government's case, counsel for Dr. Katz moved the court for a judgment of acquittal and pointed out to the court that the Government had produced for the jury absolutely no standard as to what constitutes a "hospital visit."

The defense produced another member of the hospital staff who testified that Dr. Katz saw his patients every night and that she accompanied him almost every night. Other defense witnesses testiifed that Dr. Katz usually made his rounds at night and that they did not remember Dr. Katz taking any vacation whatsoever during the period of time covered by the indictment. Dr. Katz himself testified that he often made his rounds twice each day.

The defense also produced a hospital administrator from another hospital in St. Petersburg, Florida, who testified that a hospital visit by a doctor may simply be just to say "Hello, how are you feeling today." The witness testified that the question of time is not always important as to whether or not a visit constitutes a hospital visit. This testimony from this witness was the only evidence during the entire four-week trial on the question of what constitutes a hospital visit.

Nevertheless, during his closing argument, counsel for the Government again argued to the jury that there is a distinction between "rounds" and "a meaningful hospital visit."

Subsequent to the trial, counsel for Dr. Katz filed a Motion for New Trial, which was denied by the district court without allowing a hearing on said Motion.

The judgment of conviction was appealed to the United States Court of Appeals for the Fifth Circuit and that court assigned the case to its summary docket and, in spite of a special request for oral argument, affirmed the judgment of conviction without allowing any such argument. A timely Petition for Rehearing was filed in that court again requesting an opportunity for oral argument and said Petition was denied without allowing any such argument.

REASONS FOR GRANTING THE WRIT

I

Dr. Katz was convicted and sentenced to two years in prison for "knowingly and willfully" making false statements in claims for payment for medical services. The claims for payment were for "hospital visits" made by Dr. Katz to his patients. The counsel for the Government argued to the jury, both in his opening statement and in his closing argument, that Dr. Katz did not really make "meaningful hospital visits" but instead made only "rounds." The trial court did not instruct the jury on the issue of what constitutes a "hospital visit."

The only evidence in the whole case on the question of what constitutes a "hospital visit" was the testimony of a hospital administrator produced by the defense. This witness testified unequivocally that a "hospital visit" by a doctor can be just to say "Hello, how are you feeling today." The witness explained that a "hospital visit" occurs when the doctor "goes to see the patient in his room with the chart and visits with the patient." The witness stated specifically that the question of time is not important in determining whether or not a visit has occurred.

In spite of this uncontradicted evidence, the Government counsel attempted, and with apparent success, to persuade the jury that Dr. Katz' "rounds" did not constitute "meaningful hospital visits." In other words, even though the uncontradicted evidence indicates that Dr. Katz' practice of making rounds was strictly in accord with accepted medical practice, the Government counsel converted this practice into criminal conduct.

Clearly, a conviction thus achieved cannot withstand the application of principles of due process. This Court has very recently recognized that "all [persons] are entitled to be informed as to what the State commands or forbids." The law must give fair notice of offending conduct. *Papachristou* v. *City of Jacksonville*, 92 S.Ct. 839, 843 (1972). Although, in that decision, this Court decided that a statute was unconstitutionally vague and although the applicable statute in the instant case may not be subject to that attack, the special definition given by the Government to the term "hospital visit" causes the instant conviction to be subject to the same deficiency denounced by this Court in *Papachristou* v. *City of Jacksonville, supra.*

How was Dr. Katz supposed to have known that by making rounds and filing claims for payment for such rounds he would find himself convicted of "knowingly and willfully" making false statements? Can it be seriously contended that Dr. Katz had fair notice that his rounds might not be considered hospital visits and might lead to his conviction?

Furthermore, there is absolutely no evidence in this case that Dr. Katz "knowingly" made false or fraudulent statements in connection with the hospital visits. The statute under which Dr. Katz has here been convicted, 18 U.S.C.A. §1001, requires knowledge of the falsity or faudulent nature of the statements. This Court has

adopted the Model Penal Code definition of "knowingly." *Leary* v. *United States,* 395 U.S. 6, 46, n. 93, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969).

In a recent case involving a statute similar to the statute in the instant case, the Second Circuit Court of Appeals has applied the definition thus adopted by this Court. See *United States* v. *Squires,* 440 F.2d 859 (2d Cir. 1971). In the *Squires* case, the defendant was convicted of "knowingly" making a false statement in connection with the acquisition of a firearm. In reversing the conviction, the Second Circuit held that for the jury to convict the defendant it was necessary for the jury to find either that the defendant was "aware of a high probability" that the statutes prohibited him from receiving a firearm or that he deliberately avoided reading the Firearms' Transaction form and that, if he had read the form, he would have been "aware of a high probability" that he was prohibited by the statutes from receiving the firearm.

As applied to the instant case, the principles stated by the Second Circuit would allow a conviction of Dr. Katz only if the Government had proved that Dr. Katz was "aware of a high probability" that his "rounds" were not "hospital visits." However, the most thorough examination possible of all the evidence in this case would yield absolutly no suggestion that Dr. Katz had any awareness whatsoever that his rounds might not be considered hospital visits. Under these circumstances, the verdict of the jury based upon the specious distinction created by the prosecuting attorney and the conviction based on that verdict cannot be reconciled with fundamental principles of due process.

II

It is fundamental that in a criminal case the Government must prove every element of the offense beyond a reasonable doubt. *Holland* v. *United States*, 348 U.S. 121, 75 S.Ct. 137 (1955); *American Tobacco Company* v. *United States*, 328 U.S. 781, 66 S.Ct. 1125 (1946). In the instant case, however, the Fifth Circuit reviewed the evidence and has applied a substantial evidence test wihout regard to the requirement of proof beyond a reasonable doubt, just as if this case were a civil case. In its opinion, the Fifth Circuit has introduced its evidentiary comments by noting the substantial evidence test and then, following its cursory statement of the evidence, the Fifth Circuit has stated (A5):[1]

> "In sum, this evidence was sufficient to make a question for the jury as to each count."

Of course, it cannot be proved conclusively from the brief opinion of the Fifth Circuit that the court applied the substantial evidence test without regard to the principle of proof beyond a reasonable doubt. However, the opinion itself does not even purport to have been concerned with proof beyond a reasonable doubt. Moreover, the whole framework of the opinion suggests a review of the evidence adduced in a civil case. The court describes certain of the Government's evidence and then states that the defensive evidence was "to the contrary." The court makes no attempt to determine if the Government's evidence meets any standard beyond that required in a civil case. The court seems wholly satisfied once it establishes that there might be conflicting evidence regardless of the quality of the Government's evidence.

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1. "(A)" refers to Appendix appended hereto.

The real proof, however, that the Fifth Circuit had no concern for the requirement of proof beyond a reasonable doubt lies in an analysis of the evidence as a whole. The evidence in support of the Government's contentions is *negative, circumstantial* evidence such as the testimony of the hospital patients who could have been sleeping or under medication and who could not be expected to remember the rounds made by Dr. Katz. The contrary evidence produced by the Government and by the defense consisted of witnesses who *affirmatively* and *directly* testified that Dr. Katz in fact made the rounds. The Government produced absolutely no direct, affirmative evidence that Dr. Katz was somewhere other than in the hospital on the days in question.

No one who is familiar with the evidence in this case can reasonably argue that the Fifth Circuit went beyond its initial determination that a conflict in the evidence might exist. The Ninth Circuit Court of Appeals, in *United States* v. *Nelson*, 419 F.2d 1237, 1242 (9th Cir. 1969), has recognized this practice of some circuit courts of applying the substantial evidence test in criminal as well as civil cases. The Ninth Circuit has concluded that the decisions of this Court require application of a different test from the substantial evidence test namely, a test "reflecting the burden of establishing guilt beyond a reasonable doubt."

The failure of the Fifth Circuit in the instant case to require proof beyond a reasonable doubt conflicts not only with the decision of the Ninth Circuit in *United States* v. *Nelson, supra*, but also with the decision of the Eighth Circuit in *United States* v. *Jones*, 418 F.2d 818 (8th Cir. 1969), the decisions of the Tenth Circuit in *Pauldino* v. *United States*, 379 F.2d 170 (10th Cir. 1967), and in *United States* v. *Wright*, 450 F.2d 992 (10th Cir. 1971), and the

decision of the Seventh Circuit in *United States* v. *Delay*, 440 F.2d 566 (7th Cir. 1971). In each of these decisions, the respective court of appeals went beyond the substantial evidence test to determine if the evidence in favor of the Government was sufficient to prove guilt beyond a reasonable doubt. It is this extra step which is so crucial in appellate review of criminal cases; yet it is this step which the Fifth Circuit has omitted in the instant case.

We respectfully submit that the decision of the Fifth Circuit necessarily conflicts with the decisions of the other circuits and with the decisions of this Court cited hereinabove. We further submit that the equal and uniform administration of criminal justice throughout our federal system cannot exist so long as the decision of the Fifth Circuit in this case goes uncorrected.

CONCLUSION

The decision of the Fifth Circuit affirming the conviction of Dr. Katz allows the Government's counsel to convert into a crime that which is and has been an accepted medical practice. Without prior notice or reason to suspect, Dr. Katz now finds that his conduct was unlawful and, as a result, he faces two years imprisonment. Such a deprivation of liberty without due process of law is and must remain inconsistent with basic principles of criminal justice.

The most fundamental difference between criminal and civil cases under our system of jurisprudence is the burden of proof required in criminal cases. The Government must prove that the accused is guilty beyond a reasonable doubt. In this case, the Government fails to meet its burden; and the Fifth Circuit's application of the substantial evidence test regardless of this failure necessarily conflicts with applicable decisions of this Court and other circuit courts.

We submit that individual freedom is too precious a right to be lost in this fashion.

For these reasons, a Writ of Certiorari should issue to review the decision of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2063

Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

HARRY M. KATZ,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

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(February 23, 1972)

Before BELL, DYER and CLARK, Circuit Judges.

BELL, Circuit Judge: This appeal is from a judgment of conviction entered on a jury verdict finding Dr. Katz guilty on five counts of an indictment, two of which charged him with filing false statements in violation of 18

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*Rule 18, 5 Cir.; see *Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al.*, 5 Cir. 1970, 431 F.2d 409.

USCA, § 1001,[1] and three counts of which charged him with filing false statements in violation of 42 USCA § 408(c).[2] He was acquitted on a conspiracy count and on an additional count charging a violation of § 1001.

Dr. Amadio, another defendant, was found guilty on two counts charging violations of § 408(c), supra. Two employees of Pinellas General Hospital, charged in the conspiracy count, were acquitted. Dr. Amadio received a suspended sentence. Dr. Katz was given concurrent sentences with two years imprisonment. This appeal is by Dr. Katz.

The gist of the indictment was that Dr. Katz, a medical doctor, Chief of Staff of Pinellas General Hospital in Largo, Florida, and president of the corporation which owned the hospital, individually, and in conspiracy with others, falsified and misrepresented claims to the Social Security Administration for services allegedly rendered to Medicare patients. See Health Insurance For the Aged Act. 42 USCA, §§ 1395 et seq.

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1. 18 USCA, § 1001:
"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

2. 42 USCA, § 408(c):
"Whoever—

* * *

"(c) at any time makes or causes to be made any false statement or representation of a material fact for use in determining rights to payment under this subchapter;

* * *

"shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned for more than one year, or both."

There was much evidence concerning the government's contention that needless and unauthorized hospital and treatment services were rendered to patients for which statements were submitted. There was also evidence to support the government's claim of billings for services of this type which were not rendered. There were acquittals on the counts embracing these charges.

The convictions rested on counts charging that Dr. Katz and Dr. Amadio billed for patient visits in the hospital which were not made. Dr. Katz vigorously disputes the sufficiency of the evidence in this regard. He also complains of the failure of the district court, on two occasions, to order a mistrial as a result of statements made in the presence of the jury which he categorizes as prejudicial. Finding no error, we affirm.

I.

The test by which we adjudge the sufficiency of the evidence is the now familiar one that the verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the government, to support it. *Glasser v. United States*, 1942, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L. Ed. 680, 704; *Strauss v. United States*, 5 Cir., 1963, 311 F.2d 926, 928.

Each of the counts in question charged that Dr. Katz billed for and received Medicare payments for hospital visits to patients which were not made. The five counts involve five patients, each count resting on transactions having to do with a single patient. The patient visits for which billings were made at either ten or fifteen dollars per visit, were in the totals of 40, 18, 10, 9, and 9 visits.

The uniform procedure established on the trial was that Dr. Katz billed for one visit per day during each day that a patient was confined to the hospital. The evidence in support of the government's case was in the form of testimony of some patients and relatives of some patients that many of the visits were not made. One nurse testified that Dr. Katz made visits to patients on two out of three days at best. Another nurse testified that Dr. Katz visited the approximately twenty five patients in the hospital in a total of twenty minutes. There was other testimony that a patient visit by a doctor was generally noted on the nurse's patient notes. These notes disclosed only nine of the claimed visits. A doctor who resigned after three weeks with the hospital, testified that he never saw Dr. Katz make patient visits.

The evidence by way of a defense of Dr. Katz was to the contrary. There was testimony from nurses and office assistants that Dr. Katz made daily rounds in the hospital which would have included all patients. His own testimony was to the same effect and that often he made rounds twice daily. The testimony of some of the patients was negative in the sense that they could have been sleeping or under medication and might not have known of a visit by Dr. Katz. There was some testimony that nurses did not always record a visit by a doctor.

In sum, this evidence was sufficient to make a question for the jury as to each count. The jury resolved the issues against Dr. Katz on the five counts and there the matter ends.

II

The other assignment of error relates to two occurrences during the trial which gave rise to motions for a mistrial. We have carefully examined the substance of

each of them by considering them in context and in light of the corrective action taken by the district court. We conclude that the district court did not abuse its discretion in denying the motions for mistrial. Cf. *United States v. Pritchard*, 5 Cir., 1969, 417 F.2d 327; *Leonard v. United States*, 5 Cir., 1967, 386 F.2d 423.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1971
No. 71-2063
Summary Calendar

D. C. Docket No. 69-223-CR-T
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

HARRY M. KATZ,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

Before BELL, DYER and CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of

the said District Court in this cause be, and the same is hereby, affirmed.

February 23, 1972

Issued As Mandate:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2063
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

HARRY M. KATZ,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

---

(March 17, 1972)

ON PETITION FOR REHEARING
Before BELL, DYER and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and Appendix have been furnished by U.S. mail, postage prepaid to Solicitor General, Department of Justice, Washington, D.C. 20530; Bernard Dempsey, Jr., Esquire, Assistant United States Attorney, Post Office Building, Tampa, Florida 33602; and to Edward W. Wadsworth, Clerk, United States Court of Appeals, Fifth Circuit, Room 408, 400 Royal Street, New Orleans, Louisiana 70130 on this ..... day of April, 1972.

.....

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No. 71-1330

In the Supreme Court of the United States

OCTOBER TERM, 1971

HARRY M. KATZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1330

HARRY M. KATZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on five counts of a 31-count indictment charging him and others with making false statements to the Social Security Administration in connection with the administration of the Health Insurance for the Aged ("Medicare") Act (42 U.S.C. 1395 *et seq.*), in violation of 18 U.S.C. 1001 (Counts Six and Thirty) and 42 U.S.C. 408(c)

(Counts Two, Thirteen, and Sixteen).[1] On June 29, 1971, he was sentenced to two years' imprisonment on each of the two counts charging violations of 18 U.S.C. 1001 and to one year on each of the other counts, all five terms to run concurrently, and in addition was fined $1,000 on each count. The court of appeals affirmed (Pet. App. A1-A6).

1. Petitioner, a physician, was Chief of Staff of Pinellas General Hospital, in Largo, Florida, and president of the corporation which owned the hospital. Each of the five counts in question charged that he billed the Social Security Administration for more hospital visits to a named Medicare patient than he had made. The number of visits claimed in the billings to have been made ranged from nine (each of two patients) to 40 and totaled 86 for all five patients (Pet. App. A3). It is undisputed that it was petitioner's uniform practice to bill the government for one visit per patient (at $10 or $15 per visit) for each day the patient was hospitalized and that the pertinent billings conformed with this schedule (Pet. App. A3; Tr. 995, 2496).[2] The government's evidence—including testimony by some of the patients, testimony by relatives of others, and the

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[1] Of the remaining 26 counts, 19 did not involve petitioner; three were dismissed prior to trial on the government's motion; judgments of acquittal were granted as to two; and petitioner was acquitted by the jury as to two (including a conspiracy count).

[2] "Tr." refers to the trial transcript, in 16 consecutively paginated volumes, a copy of which is being lodged herewith.

"nurses' notes" relating to the patients[3]—indicated that the great majority of the visits claimed to have been made were not made. For example, Ruby Clarke, the patient involved in Count Six, testified that she had seen petitioner only once or twice during her two-and-a-half-week stay at the hospital and that on the occasion or occasions in question he had merely entered the room, said "Hello, Ruby. How are you?", and departed without examining her or even waiting for her to answer (Tr. 2214-2215, 2356-106[4]). The nurses' notes reflect one visit by petitioner to this patient (G. Ex. 406; Tr. 3365). Petitioner's bill was for 18 visits (G. Ex. 240; Tr. 3365). Mabel Ragan, the patient named in Count Thirty of the indictment, could recall seeing petitioner only once during her nine-day confinement and on that occasion he did not examine her (Tr. 468-469, 2356-108). The nurses' notes reflect two visits (G. Ex. 430; Tr. 2980-2982). Petitioner billed for nine vis-

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[3] The "nurses' notes" were the rough logs contemporaneously kept by the attending nurses of their day-to-day ministrations to patients. It was the practice to record visits by the attending physicians in the notes, though "occasionally" such visits—as when the nurse would be too busy with her other duties to note them—would go unrecorded. As explained by a nurse-witness: "Let's say we try to [record visits by the attending physician in the notes]. Nurses try to. We don't always get the entries made. Sometimes we are too busy. They go without being charted occasionally" (Tr. 690).

[4] The reference "2356-106" (see also similar references *infra*) is to a single page of the transcript. (Due to a pagination error, the 220 pages following page 2356 are numbered "2356-1" to "2356-220.")

its (G. Ex. 258; Tr. 455, 3367). Farris Cox (Count Thirteen) testified that he had never to his knowledge been visited by petitioner in his hospital room during his nine-day stay, though he recalled seeing petitioner pass by in the corridor once and remembered being given an inoculation by him in his office on the occasion of his discharge. If petitioner did visit him, Cox said, it must have been while he was sleeping (Tr. 1581-1582, 2356-107). The nurses' notes show three visits (G. Ex. 413; Tr. 3366). Petitioner charged the government for nine (G. Ex. 277; Tr. 2356-107, 3361).

With respect to Nooner Campbell, the patient named in Count Two, who died prior to trial, the nurses' notes reflect four visits by petitioner during a 40-day hospitalization (G. Ex. 412; Tr. 1527, 2356-106, 3358, 3363-3364). Petitioner billed for 40 visits (G. Ex. 187; Tr. 3363). The evidence was similar as to Ora Kumler (Count Sixteen), who also died before trial (one visit mentioned in the notes, ten visits charged for) (G. Exs. 274, 424; Tr. 1790, 2356-107, 3361, 3367).

There was extensive evidence that petitioner made daily or nearly daily "rounds" of the hospital, usually in the early evening, visiting or purporting to visit patients (Tr. 503, 513-515, 685-686, 688, 692, 863-864, 931-932, 2374-2375, 2383-2385, 2392-2393, 2644, 2646, 2648-2651).[5] A nurse who worked the 3-11 p.m. shift and often accompanied petitioner on his

[5] Petitioner testified that he made the rounds twice daily, once in the morning and once at night (Tr. 2880).

rounds testified that petitioner would complete a round, during which he would see all of the approximately 30 patients in the 15-room facility, within 15 or 20 minutes. In the course of the tour, petitioner would speak to each patient who was awake, ask him how he was, and inquire if there was anything he needed. If a patient was asleep, petitioner would look at him, "check" him, and leave (Tr. 492-493, 503, 513-515). Another nurse, who worked the same shift three nights a week during the summer of 1967 (part of the pertinent period) and who accompanied petitioner on his rounds, testified that petitioner would omit the rounds some evenings. At the beginning of the summer, he made the rounds on two nights out of three or better, she said, but this average fell off towards the end of the summer. The witness, whose schedule included some week-end work, further testified that petitioner used to make his rounds on Saturdays but not on Sundays during the period of which she had knowledge (Tr. 930-932). A physician who resigned after working three weeks at the hospital, including some evening duty, testified that he had never seen petitioner make rounds (Tr. 1274-1275, 1342-1343).

A defense witness, a hospital administrator, testified that a hospital visit occurs when the doctor sees a patient in his room "with the chart"; that the length of the visit is "[n]ot always" important; that the visit "can be just to say 'hello, how are you feeling today' "; that it "can take five minutes if the patient is feeling well" or "half an hour if he is feel-

ing poorly" (Tr. 2627, 2629, 2639). There was no other testimony at trial as to what constitutes a hospital visit.

2. There is no merit to petitioner's contention that the court of appeals, in sustaining the sufficiency of the evidence to support his conviction, treated the case as though it were a civil one (Pet. 10-12). The test the court applied—that the verdict of the jury must be sustained if there is substantial evidence, taking the view most favorable to the government, to support it (Pet. App. A3)—is the correct standard applicable to criminal cases. *Glasser* v. *United States*, 315 U.S. 60, 80; cf. *Woodby* v. *Immigration and Naturalization Service*, 385 U.S. 276, 282; *Rutkin* v. *United States*, 343 U.S. 130, 135; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 254; *Pierce* v. *United States*, 252 U.S. 239, 251-252; *Abrams* v. *United States*, 250 U.S. 616, 619; *Stilson* v. *United States*, 250 U.S. 583, 588.[6] The court was also correct in holding that the evidence, summarized above, was adequate under that standard.

3. Contrary to petitioner's assertion (Pet. 7-9), it was not improper for government counsel to argue to the jury that the encounters petitioner had with

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[6] The test does not, as petitioner suggests, overlook the criminal-law requirement of proof beyond a reasonable doubt. As phrased, the rule is but another way of stating that the evidence, viewed in the light most favorable to the government, must be such that the jury could properly have inferred from it guilt beyond a reasonable doubt. Cf. *Mortensen* v. *United States*, 322 U.S. 369, 374; *American Tobacco Co.* v. *United States*, 328 U.S. 781, 787 n. 4.

his patients in his rounds in which he had merely said, "Hi, how are you?" were not "meaningful" visits of a sort for which he could properly bill the government, but had rather been fraudulent and "a sham" (Tr. 3381-3382, 3386). Neither the prosecutor nor the jury was bound by the testimony of the defense witness, referred to above, that a hospital visit can consist of a doctor's merely greeting a patient and asking how he is feeling. In the first place, the witness made the remark in the context of a larger statement in which he suggested that the *minimum* duration of a properly billable visit would be five minutes (Tr. 2639). More important, what a hospital visit consists of, as the trial court recognized, is not susceptible of precise definition. For this reason the court, without objection by defense counsel and indeed to counsel's expressed satisfaction (Tr. 3326, 3472-3473), deliberately refrained from instructing the jury as to what such a visit entails.[7] In these circumstances, the prosecutor properly noted in his summation that the phrase "hospital visit" is not a term of art, but one the jurors could properly interpret in the light of their knowledge, intelligence, and experience as laymen (Tr. 3380-3381). Cf. *Byrd* v. *United States*, 312 F. 2d 357, 358 (C.A. D.C.).

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[7] The instructions appear at Tr. 3531-3577.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1972.

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IN THE

Supreme Court of the United States

OCTOBER TERM — 1971

No. 71-1330

HARRY M. KATZ,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING

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PETITION FOR REHEARING

The Petitioner, HARRY M. KATZ, pursuant to Rule 58, Supreme Court Rules, files this his Petition for Rehearing directed to the Order of this Honorable Court in this cause dated June 26, 1972, denying Petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

In the Petition for Writ of Certiorari, we demonstrated that the uncontradicted evidence presented at the trial in this cause indicates that Dr. Katz' practice of making "rounds" was in accord with accepted medical practice. We argued that counsel for the Government converted this practice into criminal conduct without prior notice to Petitioner and that, therefore, Petitioner was convicted in spite of fundamental principles of due process.

The method employed by Government counsel at the trial to obtain the conviction of Petitioner consisted of making a specious and artificial distinction between

"rounds" and "meaningful hospital visits." Even in its Memorandum for the United States in Opposition, filed herein, the Government has continued to argue in terms of such a distinction, as is evidenced by the Government's recitation of testimony that Petitioner "would see all of the approximately 30 patients in the 15-room facility, within 15 or 20 minutes." (Memorandum, page 5) The Government has ignored the fact that there was absolutely no evidence at the trial to indicate that Dr. Katz was, or should have been, aware that such conduct might be considered criminal.

Since the filing of our original Petition, previously unavailable evidence supporting Dr. Katz' practice of making "rounds" has come to our attention. Specifically, on a typical day in the life of Dr. Michael DeBakey, one of the country's most respected heart surgeons, we find that Dr. DeBakey may make "rounds" in which he visits 37 patients in 30 minutes.[1] Are these visits "meaningful hospital visits? "If some of the 37 patients seen by Dr. DeBakey are Medicare patients, would he be subject to prosecution for Medicare fraud for claiming reimbursement for hospital visits to those patients? If so, what notice does he have that his conduct might be considered criminal? If not, how can the prosecution of Petitioner in this case be justified?

Regardless of the obvious injustice of convicting the Petitioner of following an accepted medical practice, the jury could very well have been led to believe by Government counsel that there in fact exists a distinction between "rounds" and "meaningful hospital visits" and, on that basis, could have reached their verdict. This procedure is such a departure from fundamental

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[1] Schanche, Don A., "One Day in the Life of a Heart Surgeon," *Reader's Digest*, page 56 (July, 1972).

due process that no remedy short of reversal of the conviction can be consistent with basic principles of criminal justice. Accordingly, we respectfully request this Court to reconsider its Order Denying the Petition for Writ of Certiorari and, upon reconsideration, grant said Petition.

CERTIFICATE OF COUNSEL

The undersigned counsel for Petitioner, pursuant to Rule 58, hereby certify that this Petition for Rehearing is presented in good faith and not for delay[2] and that the Petition is restricted to the grounds specified in said Rule.

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[2] No Stay of Mandate of this Court has been sought.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true copies of the foregoing Petition for Rehearing have been furnished by mail to Solicitor General, Department of Justice, Washington, D. C. 20530; Bernard L. Dempsey, Jr., Esquire, Assistant United States Attorney, Post Office Building, Tampa, Florida 33602; and to Edward W. Wadsworth, Clerk, United States Court of Appeals, Fifth Circuit, Room 408, 400 Royal Street, New Orleans, Louisiana 70130, on this _____ day of July, 1972.

_____

Attorney